IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN PETER HANSEN, Plaintiff,	:	
v.	:	CIVIL ACTION NO.: 98-1555
PECO ENERGY CO., et al., Defendants.	:	

MEMORANDUM

R.F. KELLY, J. AUGUST 25, 1999

This is a personal injury action brought by Plaintiff John Hansen against Defendants National Railroad Passenger Corporation ("Amtrak"), PECO Energy Co. ("PECO"), Conrail, SEPTA, Jam's Spirited Grille ("Jam's") and the individual owners of Jam's, Mark Viggiano, Anthony Heiser and Jamie Viggiano. This action was initially commenced in the Court of Common Pleas of Philadelphia County on February 11, 1998. Defendant Amtrak removed the case to this Court on March 24, 1998. Plaintiff thereafter filed his complaint in this Court.

Plaintiff alleges that on February 26, 1996, at approximately 12:00 a.m., he climbed a catenary structure along the railroad tracks in the vicinity of 176 E. Conestoga Road in Tredyffrin Township, Devon, Pennsylvania, near an office owned by Dr. Donald Rosato. Before arriving at this address to visit his cousin, who lived in an apartment over Dr. Rosato's office, Hansen, who was 20 years old at the time, had been socializing and drinking beer with a friend, Christine Barruzza, at Jam's.

Despite warnings from Ms. Barruzza to come down from the structure, Hansen continued to climb higher and then came in contact with live electrical wires. Hansen was electrocuted and fell from the catenary, sustaining serious injuries.

Plaintiff's Complaint alleges that his injuries were caused as a direct result of the recklessness and negligence of the Defendants in failing to prohibit individuals from having access to their property by fencing or guarding the area, posting adequate signs, providing security or warnings, placing guards or barriers, or accessing deterrent devices on the property. Complaint at ¶ 16. In other words, Plaintiff claims that he was injured because there existed an unfenced and unguarded ladder, access tower and/or utility tower to the catenary system and its power supply system and wires, which permitted persons, such as Plaintiff, easy access to climb onto the catenary system and be exposed to the energized power lines suspended therefrom. Complaint at ¶ 19.

Presently before this Court are motions for summary judgment filed by Defendants Amtrak and PECO. For the following reasons, Defendants' motions for summary judgment will be granted.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the

nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. "`[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Estate of Zimmerman v. SEPTA, 168 F.3d 680, 684 (3d Cir. 1999) (citation omitted).

DISCUSSION

At the outset, the parties dispute the extent of the

duty owed by Defendants to Plaintiff.[1] Defendants Amtrak and PECO Energy argue that Plaintiff was a trespasser, having entered upon Amtrak property without permission or privilege, and, thus, the only duty owed to a trespasser by Amtrak, as the possessor of property, and PECO, as the supplier of electricity, was to avoid willful or wanton misconduct. Zimmerman, 168 F.3d at 687 (trespasser must show that electricity supplier and owner of land committed wanton or willful negligence or misconduct). According to Plaintiff, however, there are material facts in dispute as to what legal right Amtrak has to the property on which its catenary structure is located, whether it is located on the Rosato property, and what, if any, legal right PECO has to place its high voltage power lines across the Rosato property. Pl.'s Brief at 58-59 (citing Carpenter v. Penn Central Transportation Co., 409 A.2d 37 (Pa. Super. Ct. 1979)[2]). In this regard, Plaintiff

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[1] "The duty to protect against known dangerous conditions falls upon the possessor of the land. The possessor of land occupies the land with the intent to control it." Zimmerman, 168 F.3d at 684. Similarly, "[s]uppliers of electricity owe a duty of care to all people in proximity to the wires through which high-voltage electricity flows; the degree of care varies with the status of the injured person on the land." Id. at 685.

[2] In Carpenter, the administratrix of an estate brought a wrongful death suit for a decedent who was electrocuted after climbing on top of a train and coming into contact with the pantograph. After the decedent had been robbed at knife point, stripped and stabbed in the leg, the decedent climbed on top of the train in order to retrieve his clothes which had been thrown there by the robber. Because the status of the victim was not so clearly established that the court could have decided he was a trespasser as a matter of law, the judgment of the lower court

contends that, based upon available information from a search of the deeds going back to 1835, it appears that PECO and even Amtrak may be deemed to be trespassers, and therefore all of their claimed defenses would be totally invalidated. Pl.'s Brief at 62-64 (citing Pittock v. Central District & Printing Telegraph Co., 31 Pa. Super. 589 (1906)).

The record shows, however, that Amtrak was in lawful possession of the railroad right of way and structure. As Amtrak explains, the Pennsylvania Railroad, after originally acquiring the right of way behind Dr. Rosato's property, expanded it to its present dimensions by virtue of condemnation and payment to the original owners for the property. Amtrak's Reply Brief at 16 (citing Aff. of Daniel Jeffreys, Ex. R). Amtrak further explains that the catenary structure involved was constructed by the Pennsylvania Railroad in early 20th Century and exists within the boundaries of the railroad right of way. Id. (citing Aff. of Belknap Freeman, Ex. T). Then, in 1956, the Pennsylvania Railroad entered into an occupancy agreement, granting PECO the right to operate, maintain, renew and repair the 33,000 volt circuit existing on the structure. See Agreement between The Pennsylvania Railroad and Philadelphia Electric Co., dated 4/25/56, at 1 (Ex. A to PECO's Reply Brief). Defendant PECO adds that it has been in possession of the power line at issue for

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was reversed and the case was remanded for a new trial.

more than forty years, pursuant to the 1956 agreement with the Pennsylvania Railroad.[3] Thus, the Pennsylvania Railroad and its successors acquired the right to exclusive possession of the land so far as necessary for railroad purposes and for such purposes to build over the surface and raise and maintain any appropriate superstructure therein as absolutely and as uncontrolled as an owner in fee. Amtrak's Reply at 18 (citing Ferguson v. Pittsburgh and S.R. Co., 98 A. 732, 734 (Pa. 1916)).

In support of his theory that Amtrak and PECO are trespassers, Plaintiff offers the affidavit of Frank Sellers (Pl.'s Ex. 12), attesting to his title search of the premises at 176 E. Conestoga Road (Dr. Rosato's property). Mr. Sellers' affidavit states that, according to his search, the Rosato property does extend some 60 feet into the railroad right-of-way. Id. at ¶ 6. However, in a letter by Sellers, dated 2/19/97, he speculates that the railroad right of way behind the Rosato property may have been taken by condemnation. (Pl.'s Ex. 12.) Thus, Mr. Sellers does not actually contest the existence of the railroad right of way. Because Plaintiff has failed to provide this Court with any substantial evidence to support his challenge to the property rights of Amtrak and PECO, this Court concludes

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[3] According to PECO, "[t]he power line was constructed by the railroad prior to 1956, the date of the occupancy agreement with Philadelphia Electric" and "[t]he power line already existed for railroad use long before it was ever purchased by the supplier of electricity." See PECO Reply at 4 n.4, 14.

that the standard of care that Defendants are subject to with respect to Plaintiff is the general duty owed to trespassers -- the duty to refrain from wantonly or willfully injuring trespassers.[4]

Amtrak acknowledges that there are narrow exceptions carved out from the general rule that the only duty owed to a trespasser is the avoidance of willful or wanton misconduct, however, Amtrak asserts that no such exception is present in the instant case. For example, Plaintiff contends that he was a foreseeable trespasser and therefore was owed a higher duty of care by the Defendants. See, e.g., Frederick v. Philadelphia Rapid Transit Co., 10 A.2d 576, 578 (Pa. 1940). Plaintiff states that "[w]hen an accident occurs at a property where the injured party has no right to be, the injured party may recover if it appears that, because of something peculiar to the property, the owner of the property had reason to suppose that some person might be upon the property." Pl.'s Brief at 55 (citing Francis

[4] In Pittock, the Pennsylvania Superior Court held that a landowner whose land was condemned by a railroad was entitled to be compensated for the use of his land by the telephone company after it erected ten poles and a telephone line along the railroad right of way. Plaintiff's reliance on Pittock for the proposition that PECO may be considered a trespasser is misplaced. Plaintiff is not a landowner complaining of an additional burden imposed on the land by the power line at issue. Rather, Plaintiff is a third-party trespasser complaining about PECO's continuing maintenance of a power line for the same use for which it was previously erected and maintained, and that it has been in possession of for over forty years, pursuant to an agreement with the railroad.

v. Baltimore & Ohio R. Co., 93 A. 490 (Pa. 1915)). "What constitutes sufficient notice to an owner of property that there may be a trespasser depends upon the facts in each case." Id. (citing Frederick, 10 A.2d at 578). Here, Plaintiff submits that Defendants had every reason to know that individuals would be very near the catenary structure -- since it was located at the edge of the lawn of the Rosato property, where people would gather on a regular basis.[5] Thus, Plaintiff asserts that it is foreseeable that young adults would be attracted to the structure that is so easily accessible.

In Zimmerman, a case very similar to the instant matter, a twenty-three year old male entered an area where trains run between 30th Street Station and Suburban Station in Philadelphia. As in the instant action, the young man was electrocuted after climbing to the top of a metal catenary

[5] The facts in this case are readily distinguishable from cases where courts have held railroads to be on notice of the presence of trespassers. For example, Plaintiff cites Frederick, a case where a plaintiff was injured when he slipped from a subway platform into the pathway of a train. After his body triggered an automatic braking system, the conductor was told that a man had fallen beneath the platform and the conductor made a cursory examination. Finding nothing beneath the train, the conductor proceeded forward. The entire train passed over the plaintiff's body, resulting in horrible injuries to his lower extremities. Under those facts, the court found that the issue of whether the defendant was put on notice as to the presence of the trespasser at the time the train went into its emergency stop was for the jury to determine. 10 A.2d at 578. In contrast, it was not until after the accident in the instant matter that the defendants learned of Hansen's presence.

structure. And like the case at hand, the plaintiff in Zimmerman claimed that there was an issue of material fact as to whether Zimmerman was a trespasser, theorizing that the defendants, by permitting the victim and other homeless people to enter and remain in the track area, may have given Zimmerman implied consent to be in the track area and, thus, Zimmerman may have been a licensee. The Third Circuit recognized, however, that "a foreseeable trespasser is still a trespasser." Zimmerman, 168 F.3d at 686. Thus, "[m]ere acquiescence to trespassing does not alter an entrant's status." Id.

Next, the parties disagree on whether Plaintiff assumed the risk of his injuries. According to Hansen, his knowledge and appreciation of any danger from electrocution only pertained to the lower Amtrak catenary wires which he avoided on prior occasions when he climbed the structure. Hansen claims that he had no knowledge of the PECO high voltage power lines above the Amtrak catenary and, therefore, no subjective appreciation of the specific risk. Based on the above, Plaintiff argues that this disputed factual issue should be given to a jury to decide. See Pl.'s Brief at 49-53. Plaintiff adds that, as a result of his consumption of alcohol, it cannot be held as a matter of law that he fully understood and appreciated in his diminished capacity the specific risk of electrocution by high voltage wires that he was not even aware existed. Pl.'s Brief at 54.

Under Pennsylvania law, "the assumption of the risk analysis is incorporated into the duty analysis." Kaplan v. Exxon Corp., 126 F.3d 221, 225 (3d Cir. 1997) (citing Howell v. Clyde, 620 A.2d 1107 (Pa. 1993) and Carrender v. Fitterer, 469 A.2d 120 (Pa. 1983)). It is the plaintiff's burden to establish that defendants had a duty. Once plaintiff has established that a duty existed, the issue of whether the plaintiff assumed the risk of injury goes to the jury unless reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury. Kaplan, 126 F.3d at 225. Under such circumstances, defendants, as a matter of law, owed plaintiff no duty of care. Howell, 620 A.2d at 1113.

Here, reasonable minds could not disagree that Plaintiff climbed the catenary structure knowing that if he came into contact with the wires he could be seriously injured. Deposition of John Peter Hansen, dated 9/28/98 ("Hansen Dep."), at 66-74 (Ex. J to Amtrak's S.J. Motion). Plaintiff Hansen encountered a known and obvious risk. While Plaintiff claims that he was only aware of the risk of touching one set of wires attached to the catenary structure, such after-the-fact rationalizations have been rejected by the Pennsylvania Supreme Court. See Howell, 620 A.2d at 1110-11 n.9 ("There are some dangers that are so obvious that they will be held to have been

assumed as a matter of law despite assertions of ignorance to the contrary.").

As for Plaintiff's contention that he could not have assumed the risk of electrocution due to his consumption of alcohol, Defendant PECO points out that "[i]t is well-settled that voluntary intoxication is not an excuse for failing to exercise due care." PECO's Reply at 25 n.21 (citing McMichael v. Pennsylvania R. Co., 1 A.2d 242 (Pa. 1938)). In any event, the record shows that Plaintiff, even in an allegedly intoxicated state, told his friend, Ms. Barruzza, who witnessed the event, that he was aware of the specific risk of touching the wires, an obvious danger to Plaintiff. Deposition of Christine Barruzza, dated 11/27/98, at 22 (Ex. M to Amtrak's S.J. Motion). Thus, the fact that a person is voluntarily intoxicated does not justify or excuse his failure to exercise reasonable care for his own safety.[6]

Defendants also contend that Plaintiff's own wilful and wanton conduct is a bar to recovery.[7] In response, Plaintiff

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[6] It is worth noting that this was not the first time that Plaintiff climbed the catenary structure near Dr. Rosato's office. In fact, Plaintiff testified that he climbed the structure approximately fifteen times. Hansen Dep. at 58 (Ex. J to Amtrak's S.J. Motion).

[7] "[W]ilful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain that it would ensue." Evans v. Philadelphia Transp. Co., 212 A.2d 440 (Pa. 1965). Wanton misconduct "means that the actor has intentionally done an

argues that he is not guilty of willful or wanton misconduct, but, instead, is a victim of a crime, having been furnished alcoholic beverages by Defendant Jam's. Pl.'s Brief at 59-60 (citing Carpenter v. Penn Central Transportation Co., 409 A.2d 37 (Pa. Super. Ct. 1979) (decedent was electrocuted after climbing on top of a train to retrieve clothes and came into contact with pantograph after having been robbed at knife point, stripped and stabbed in the leg)). Because of the illegal acts of a third person, Plaintiff contends that he was not capable of having the necessary mental capacity or intent to engage in willful or wanton misconduct.

Despite Plaintiff's arguments to the contrary, this Court finds, as in Lewis v. Miller, 543 A.2d 590 (Pa. Super. Ct. 1988), that Plaintiff, while intoxicated, did engage in dangerous conduct with a reckless disregard for injury to himself. In Lewis, two young men were engaged in high-speed drag racing on a public street in violation of Pennsylvania law, having consumed alcohol. The race ended with one of the drivers dying from injuries he sustained after his car skidded and rolled up against a stone wall, ejecting him from the vehicle. The administrator of the decedent's estate sued the other racer for damages,

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act of unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences." Id.

alleging the proximate cause of the accident to be the reckless operation of the survivor's automobile. On appeal from the granting of a compulsory nonsuit, the Pennsylvania Superior Court held that the trial judge was correct in not allowing the case to be submitted to the jury. In doing so, the court determined that both men engaged in wanton conduct when they agreed, while legally intoxicated, to drag race on a dangerous blind curve. Lewis, 543 A.2d at 592.

Plaintiff attempts to distinguish the instant matter from Lewis by arguing, to no avail, that the plaintiffs in that case were not only engaging in conduct life-threatening to themselves, but criminal with regard to causing harm to others. Plaintiff goes on to describe his behavior as "boyish, innocuous conduct" in that he merely climbed on a readily accessible tower for the purpose of waiving goodbye before departing the next day for home. Pl.'s Brief at 59-60. Such reasoning, however, cannot excuse Plaintiff from accepting responsibility for his own conduct. As Amtrak notes, Plaintiff did have a choice in this matter -- he should not have climbed the structure. Amtrak's Reply at 35 n.17 (citing Kaplan v. Exxon Corp., 126 F.3d 221, 226 (3d Cir. 1997)).

Plaintiff further argues that the warning signs on the catenary pole were faded and unreadable in violation of the National Electric Safety Code ("NESC"). Pl.'s Brief at 40-42.

To further support his position, Plaintiff points to the affidavit of Hugh McGrogan, P.E., a licensed electrical engineer in Pennsylvania, who states that the failure to fence, barricade, deter, place the power lines out of reach without a ladder, or the failure to provide adequate and effective warnings on the structure at or near where people frequently gather is an intentional act so unreasonable that it shows a complete disregard of a known or obvious risk as to make it highly probable that grievous bodily harm would follow. In response to Plaintiff's allegations of NESC violations, PECO argues that such violations can only be considered as evidence of an industry standard which a plaintiff claims was violated, not failure to refrain from willful and wanton misconduct -- the legal duty owed to Plaintiff in this case. See Heller v. Consolidated Rail Corp., 576 F. Supp. 6, 9 (E.D. Pa. 1982), aff'd, 720 F.2d 662 (3d Cir. 1983).

In Heller, a student was seriously injured when he climbed atop a boxcar that was temporarily stopped on train tracks and came in contact with an overhead electrical wire. Like the instant case, the plaintiff in Heller argued that the defendant was liable for its failure to erect a fence along its tracks to prevent access to them, for failing to warn of the existence of the overhead wires, and for placing the electrical wires too low for safe clearance. In granting defendants'

motions for summary judgment, the court rejected the above arguments, finding that Pennsylvania law clearly imposes no duty upon a railroad to fence its right of way to prevent trespassing and that the lack of any fencing was clearly not a proximate cause of plaintiff's injuries.[8] Heller, 576 F. Supp. at 11. As for plaintiff's arguments that the defendants are liable for failing to warn of the existence of the overhead wires and for placing them too low for safe clearance, the court observed that the plaintiff was generally aware that some of the trains using the tracks were powered by electricity and that the overhead wires contained electricity. Id. In addition, the court reasoned that in order to impose liability upon the defendant for these acts, it must have been reasonably foreseeable to the defendant that the plaintiff's injuries would result from the defendant's actions. Id. at 11-12. Because the court found that it was not reasonably foreseeable to the defendants that the plaintiff would trespass upon its land, climb upon its boxcar, and be injured by electrical wires 22 feet above the tracks, in light of the fact that railroads are entitled to assume that their property is free from trespassers, the Heller court concluded that the defendant was not negligent. Id. at 12.

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[8] The Heller court stated the plaintiff's contention that the defendant was liable as a result of no fencing "might be more tenable if the plaintiff had been struck by a moving train as he was crossing unfenced tracks." 576 F. Supp. at 11. The same can be said for the case at hand.

Here, Amtrak and PECO, like the defendants in Zimmerman and Heller, did not commit wilful or wanton misconduct by inadequately posting warning signs pertaining to the electrical wires' danger or by failing to prohibit individuals from having access to the property. Indeed, there is no evidence that Defendants were aware that Hansen or anyone else had climbed the catenary structure prior to Plaintiff's electrocution. And even if Plaintiff's contention is correct and Defendants were aware that these catenary structures are climbable and that other incidents have occurred involving children and adults who have been injured while climbing up such structures, "[k]nowledge of a specific risk cannot be imputed from knowledge of a general risk." Zimmerman, 168 F.3d at 688. That Plaintiff has failed to provide this Court with evidence that Defendants realized that Mr. Hansen was in imminent danger and so recklessly disregarded his peril that there was in effect a willingness by Defendants to inflict injury upon him provides this Court with further grounds for granting Defendants' summary judgment motions.[9]

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[9] Amtrak has also argued that Plaintiff cannot recover damages because he was more than fifty percent (50%) negligent as a matter of law. Def.'s Brief at 81 (citing Hillerman v. Com. Dept. of Transp., 595 A.2d 204 (Pa. Cmwlth. 1991)). With respect to Defendants' comparative negligence argument, Plaintiff argues that such an issue is for the jury to determine and, if the jury decides that the Defendants' conduct is willful or wanton and that Hansen's negligence is ordinary, comparative negligence principles are inapplicable in this case. In the instant matter, this Court has already found that Plaintiff has engaged in wanton misconduct and that Defendants owed Plaintiff a duty of care to

Finally, with respect to Plaintiff's claim that PECO Energy, as the supplier of high voltage electricity, is strictly liable to plaintiff for his injuries, PECO correctly responds that the electricity in PECO's distribution system is not a "product" for strict liability purposes and, thus, Plaintiff's claims must fail. Schriner v. Pennsylvania Power & Light Co., 501 A.2d 1128, 1134 (Pa. Super. Ct. 1985) ("[W]hile still in the distribution system, electricity is a service, not a product; electricity only becomes a product, for purposes of strict liability, once it passes through the customer's meter and into the stream of commerce.").

Based on the above, the summary judgment motions filed by Amtrak and PECO are granted. An order will follow.

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avoid wilful or wanton misconduct. Under such circumstances, the Pennsylvania Superior Court has declined to submit the issue of the degree of wantonness of each party to the jury for determination, since the Pennsylvania legislature has not provided an act similar to the Comparative Negligence Act which would permit a jury to compare relative degrees of wantonness on the part of each party. Lewis, 543 A.2d at 592-93.

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ORDER

AND NOW, this day of August, 1999, upon consideration of the motions for summary judgment filed by Defendants National Railroad Passenger Corp. (Amtrak) and PECO Energy Co. (PECO), and all responses thereto, it is hereby ORDERED that Defendants' Motions for Summary Judgment are GRANTED.

BY THE COURT:

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ROBERT F. KELLY, J.